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In the Supreme Court of the United States

OCTOBER TERM, 1969

THE JOHN KLANN MOVING AND TRUCKING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-18) is not yet officially reported. The Board's decision and order (A. 304a-325a)[1] are reported at 170 NLRB No. 133.

[1] "A." refers to the joint appendix filed with the court of appeals. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decree of the court of appeals was entered on May 9, 1969. The petition for a writ of certiorari was filed on June 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board acted reasonably in entertaining a complaint asserting that an employee's discharge constituted an unfair labor practice, notwithstanding an earlier determination by an employer-union grievance committee, established under the applicable collective bargaining agreement, that the discharge did not violate the agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 137, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 3-4 of the petition.

STATEMENT

Petitioner's employees were covered by a collective bargaining agreement which contained a procedure for the settlement of grievances, including disputes over discharge (A. 305a; 258a-264a). Grievances not resolved at the local level went to a permanent grievance committee composed of three employer and three union representatives, which could decide the griev-

ance issue by a majority vote (A. 305a, 313a, 314a; 258a, 261a, 298a).

Leo Halada was an employee of 11 years' standing (A. 305a; 80a). In April 1964, he first used the grievance machinery to register a complaint against petitioner, charging that it was not complying with the overtime and vacation pay provisions of the contract (A. 305a-306a; 43a-46a, 80a-81a). Petitioner's president, Woidke, responded by calling a meeting of the drivers who would be affected by the resolution of Halada's grievance (A. 306a; 200a-201a, 287a). Woidke told the men that petitioner could not afford literal compliance with the contract and, if it were enforced, they would have to lay over at various places at night instead of being able to return home (A. 306a; 82a-83a, 59a-60a). A show-of-hands vote was then taken, and only Halada voted for adherence to the contract, although several other drivers had previously complained about the overtime pay matter (A. 306a; 83a, 136a, 171a-172a, 188a-189a, 49a-51a).

Soon thereafter, Halada was taken off his regular run and he filed another grievance (A. 306a; 83a-87a). In November 1964, he filed three more grievances, all relating to his seniority and the general perquisites of seniority (A. 306a; 84a-87a). At least two of these grievances were remedied (A. 306a; 85a, 87a). Shortly after Halada filed these grievances, the Company began to assign him trips requiring layovers without the customary advance notice (A. 306a; 87a-88a). On his complaint to the Union that he

was being unfairly treated because he had been filing grievances, the layovers ceased (A. 306a-307a; 88a).

During the following months, Halada frequently complained to the Union that petitioner was not complying with the overtime or vacation pay provisions of the contract (A. 307a; 90a-93a). In April 1965, he filed another grievance on those items (A. 307a; 88a-92a, 135a-139a). President Woidke thereupon called another meeting of the drivers, at which he referred to Halada as "our trouble-making friend" (A. 60a, 93a-94a). Woidke repeated his previous statement about overnight layovers if the contract were adhered to in literal fashion (A. 95a). Halada reminded Woidke that grievances could be filed against him (A. 95a). The employees again voted in favor of the existing arrangement, this time by only a one-vote margin (A. 60a-61a, 95a).

In February 1966,[2] Halada, together with another employee, again complained to the Union about overtime and vacation pay issues, whereupon the Union told them it had given the Company 90 days to "straighten up" and start to honor the contract (A. 307a-308a; 57a-58a, 98a, 101a). About a month later, Woidke summoned the two employees to a private meeting in his office and told them that he was "sick and tired of [their] going to the Union and causing him headaches" (A. 308a; 62a, 101a). As a result of this meeting, it was agreed that Halada would make short, local runs most of the time (A. 308a, 62a-63a, 101a-102a, 181a-182a, 281a). Halada there-

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[2] All dates hereafter are in 1966.

after received overtime on his occasional long-distance runs (A. 309a; 41a-42a, 105a-106a, 115a, 204a-205a). However, in June, he filed another grievance, complaining that he had not received all the overtime pay due him (A. 308a; 76a-77a, 182a-183a).

The Company posted its vacation schedule in June. When Halada saw that he was listed for a three-week vacation, he complained to Woidke that he was entitled to 18 consecutive work days of vacation (A. 317a; 109a-110a). According to Halada, Woidke agreed that he should have a vacation of 18 work days plus 2 additional days, which would extend his vacation through July 29 (A. 313a, 317a-319a; 109a-110a, 116a-118a). On July 29, Halada received a registered letter from Woidke, dated July 28, stating that his "three week vacation" had ended, that he had been expected to report for duty on July 25, that he had overstayed his vacation by three days, and that, therefore, "it is considered you have quit your job and your name is being taken off the seniority list immediately" (A. 283a, 110a).

On July 30, Halada filed a grievance contending that he had been wrongfully discharged (A. 313a-314a; 241a, 286a). A deadlock over this issue resulted at the local level, and the matter was appealed to the permanent grievance committee (A. 313a; 290a-291a). At the grievance hearing, Halada asserted that he had not in fact overstayed his vacation because he was entitled to 18 work days of vacation and had obtained authorization from Woidke for an extension through July 29 (A. 313a-314a; 290a-291a). Woidke denied having agreed to any extension, re-

marking, "I'm going strictly by contract and this is what Mr. Halada wants, and this is what I want. If it's good for him, it's good for me" (A. 314a; 293a). The committee's conclusion was "that the discharge be upheld" (A. 314a; 296a).

Later that month, when Halada's name was mentioned during a conversation at a local bar, Woidke put his hand on his forehead and said, "I have had it up to here with him. He cost me a little money but I finally got him" (A. 311a-312a; 66a-69a, 46a-49a).

After the grievance committee had upheld his discharge, Halada filed an unfair labor practice charge with the Board. The Board, on the basis of the evidence detailed above, found that the actual reason for Halada's discharge was not his overstaying his vacation, but rather his militance in pressing grievances and in insisting that petitioner comply with various provisions of the collective bargaining agreement; and that the Company thus had violated Section 8(a)(1) of the Act in discharging him (Pet. App. 19-20). The Board further found that the committee's award did not preclude it from considering whether Halada was unlawfully discharged, because the committee "was neither presented with, nor did it *sua sponte* consider, the question whether the reason advanced by [petitioner] for the discharge was pretextual" (Pet. App. 20).[3] The Board ordered the Company to cease and

[3] All six members of the grievance committee testified at the Board hearing that the question of whether Halada was discharged because of his militance in pressing grievances and his insistence that the contract be literally complied with by

desist from the unfair labor practices found, to offer reinstatement to Halada and make him whole, and to post appropriate notices (A. 320a-323a, 325a).

The court of appeals agreed that the grievance committee had not considered the question of unlawful motive, and that it was thus properly considered by the Board. Accordingly, it sustained the Board's findings and enforced its order.

ARGUMENT

Section 10(a) of the Act, which authorizes the Board "to prevent any person from engaging in any unfair labor practice" (29 U.S.C. 160(a)), plainly empowered the Board to consider the instant complaint on its merits, notwithstanding the grievance committee's determination that Halada's discharge did not breach the collective bargaining agreement. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-272. As a matter of policy, however, the Board does defer to arbitration determinations under certain circumstances, and the only question presented is whether the Board acted unreasonably in declining to do so here.

Since the Board found that the grievance committee did not consider whether the Company's reason for the discharge was in fact a pretext used to mask an unlawful motive, the court below correctly concluded that the Board was justified in not acquiesc-

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the Company was never presented to or considered by the committee (A. 314a; 206a-207a, 210a-212a, 216a-220a, 224a, 226a-234a, 236a-237a, 239a).

ing in the committee's decision.[4] Nor does this case present a situation (see Pet. 9-10) where the pretext issue was willfully withheld from the grievance committee; indeed, Woidke's admission that Halada was actually discharged because of his grievance activity (see *supra*, p. 6) occurred after the grievance hearing was held.

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[4] An identical course has been followed by the Board in similar situations. See *Monsanto Chemical Co.*, 130 NLRB 1097, 1098-1099; *Mitchell Transport, Inc.*, 152 NLRB 122, 130-131, affirmed *sub nom. Hawkins* v. *National Labor Relations Board*, 358 F. 2d 281, 284 (C.A. 7); *Illinois Ruan Transport Corp.*, 165 NLRB No. 34, set aside on other grounds but with specific approval of the Board's refusal to be bound by the arbitrator's decision, 404 F. 2d 274, 280 (C.A. 8). In *Ramsey* v. *National Labor Relations Board*, 327 F.2d 784 (C.A. 7), certiorari denied, 377 U.S. 1003, the employer "fully and adequately defended [the employee's] position at the [arbitration] hearing" (Pet. App. 34). And in *National Labor Relations Board* v. *Auburn Rubber Co.*, 384 F. 2d 1 (C.A. 10), it was recognized that "the Board has the discretion to defer to, or to reject, the decision of the arbitrator" (Pet. App. 25), but there the court found that discretion to have been abused in circumstances where the issues considered by the Board had been fully canvassed during arbitration (Pet. App. 25-26). Accordingly, contrary to petitioner's contention, neither *Ramsey* nor *Auburn Rubber* necessarily conflicts with the decision below (see Pet. App. 17-18).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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